

**IN THE UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	
)	
INACOM CORP., <u>et al.</u> ,)	Chapter 11
)	
Debtors.)	Case No. 00-2426 (PJW)
)	
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)	
INACOM CORP., on behalf of affiliated)	
Debtors,)	Civil Action no. 04-582-GMS
)	Adv. No. 02-3499
Plaintiff,)	
)	
v.)	
)	
DELL COMPUTER CORPORATION, <u>et al.</u> ,)	
)	
Defendants.)	
)	
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**REPLY OF PLAINTIFF IN SUPPORT OF ITS MOTION IN LIMINE TO
EXCLUDE EXPERT TESTIMONY OF STEPHEN H. THOMAS**

Plaintiff, Debtors, InaCom Corporation on behalf of affiliated Debtors, through Executive Sounding Board Associates, Inc., Plan Administrator (“Plaintiff”), replies to the opposition filed to its Motion In Limine to exclude testimony by Stephen H. Thomas of Lain Faulkner & Co., P.C. (“Thomas”), designated by Defendants Dell Computer Corporation, Dell Receivables, L.P. and Dell Marketing, L.P. (collectively, “Dell”) as an expert witness under Federal Rule of Evidence (“F.R.E.”) 702. The testimony offered by Thomas must be excluded because it instructs the trier of fact on what legal conclusion to reach, it does not address an ultimate factual issue under F.R.E. 704 and it does not offer expertise helpful to the trier.

Thomas’ qualifications are not at issue, because his purported qualifications, notably in “public accountancy”, were not used.¹ Thomas relied solely on routine invoice and payment

¹ Thomas testified that there was no reason for him to apply general accepted accounting principles, generally accepted auditing standards or Financial Accounting Standard Board rules. (Thomas Dep. Tr. 111:7-111:23). Deposition transcript excerpts from Thomas’ deposition are attached as Exhibit A.

information provided to him entirely by employees of Dell and other information provided to him by Dell's legal counsel.² Thomas then used "simple math" and rendered a legal opinion that the payments to Dell during the preference period were made in the ordinary course of business. (Thomas Dep. Tr. 237:14-237:15).

1. "Simple Math" does not Require Specialized Knowledge

Without any factual or legal support, Dell insists that Thomas's testimony will assist the trier. In In re Shalom Hospitality Inc., 293 B.R. 211, 214 (Bankr. N.D. Iowa 2003), a case cited but misapplied by Dell, the Court stated that "[t]he test for determining the appropriateness of expert testimony is the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." (citation omitted). Nothing Thomas did in his report requires such "enlightenment".

Dell erroneously states that "Thomas analyzed 19,567 invoices during the pre-preference period and additional 611 invoices for the preference period." (Dell Motion, p. 3). This is wrong. Thomas admitted that he did not compile any of the data used in his report, nor did he independently verified any of the invoices – even those which on their face are non-sensical (e.g., invoices purportedly issued 129 days after payment). (Thomas Dep. Tr. 166:9-167:20). Instead, Thomas relied entirely on Dell for the compilation and accuracy of the data and performed nothing more than simple counting to calculate the number of days between the date on Dell's invoices and the date payment was received from Inacom at Dell's lockboxes to render his opinion.³

² Thomas testified that the data for his report came from an electronic database prepared by Dell and that he did nothing to verify its accuracy. (Thomas Dep. Tr. 166:9-167:20).

³ This "simple math" was actually done automatically by Thomas' modified Excel spread sheet software. (Thomas Dep. Tr. at 165:20-165:22; 37:22-38:22).

2. Opinion on the Ordinary Course of Business is a Legal Conclusion not an Ultimate Issue

F.R.E. 704 precludes opinion testimony that embodies a legal conclusion, specifically, one that “inadequately explores legal criteria.” (See Off. Comment F.R.E. 704). That is precisely what Thomas does in opining on the ordinary course of business under §547(c)(2)(B).⁴

Dell relies on In re Kevco, Inc., 2005 Bankr. LEXIS 1249 (Bankr. N.D. Texas June 30, 2005) for the proposition that Thomas has previously testified on the § 547(c)(2)(B) element. However, much in Kevco contradicts Thomas’ opinion in this case. In Kevco the court stated that “reliance on average payment time, as is often the case with statistics, does not portray the complete picture of [the debtor’s] payment history”. Kevco at *45. The ordinary course of business analysis must also take into account any credit holds, shipment holds, manner of payment (overnight vs first class), number of invoices covered by a single check and numerous other particularities that mark the preference period. Kevco, pp. 52-56.⁵ Thomas’ report considers none of these factors. Rather, Thomas uses “simple math” to perform subtraction and relies entirely on employees at Dell and the advice of Dell’s legal counsel in rendering his opinion, which amounts to nothing more than an instruction to the Court on how to rule on Dell’s § 547(c)(2)(B) defense. This is not expert testimony and it should be excluded.⁶

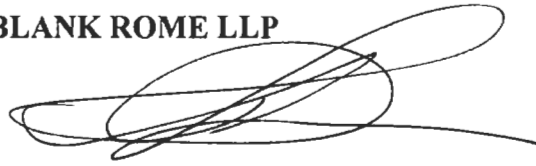
⁴ Contrary to Dell’s reliance on In re Brothers Gourmet Coffees, Inc., 271 B.R. 456 (Bankr. D. Del. 2002), the creditor’s expert in that case did not testify on what the “ordinary course of business” was. Rather, he opined on the standard term in the green coffee industry. In re Brothers, at 461.

⁵ The Kevco decision contains no discussion of Thomas’ qualifications, nor does it set forth the contents of his report. Indeed, it is not possible to tell from reading Kevco precisely what opinion Thomas offered, if any.

⁶ Thomas testified that while he became aware of unusual collection activities by Dell well after he wrote his report, and just a day before his deposition, Dell’s counsel advised him that these facts were not relevant to the preference period and he, therefore, did not consider them in his opinion. (Thomas Dep. Tr. 150:25-152:5.)

Respectfully submitted,

BLANK ROME LLP



Dated: September 6, 2005

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EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

In re:) Chapter 11
)
INACOM CORP., et al.,) Case No. 00-2426 (PJW)
)
Debtors.) Jointly Administered
)
-----)
)
INACOM CORP.,)
) Civil Action No.
On behalf of all affiliated) 04-582 (GMS)
Debtors,)
Plaintiffs,)
)
V.) Adv. Pro. No.
) 02-03499 (PJW)
DELL COMPUTER CORPORATION,)
Et al.,)
Defendants.)
-----)

ORAL DEPOSITION OF

STEPHEN H. THOMAS

JULY 13, 2005

ORAL DEPOSITION of STEPHEN H. THOMAS, produced as a witness at the instance of the Plaintiffs, and duly sworn, was taken in the above-styled and numbered cause on the 13th day of July, 2005, from 9:33 a.m. to 4:29 p.m., before David Bateman, RPR, CSR in and for the State of Texas, reported by machine shorthand, at the offices of Hughes & Luce, LLP, 111 Congress Avenue, Suite 900, Austin, Texas 78701, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

A P P E A R A N C E S

FOR THE PLAINTIFFS:

MR. EARL M. FORTE
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FOR THE DEFENDANT DELL COMPUTER CORPORATION:

MS. SABRINA STREUSAND
Hughes & Luce, LLP
111 Congress Avenue, Suite 900
Austin, Texas 78701
(512) 482-6842

ALSO PRESENT:

MR. MICHAEL L. NEWSOM (Via Telephone)
Bridge Associates, LLC

1 A Some of the materials previously existed, such
2 as an example XY chart and how to read it. Others were
3 created right before the seminar.

4 MS. STREUSAND: You prepare like the rest
5 of us.

6 Q (BY MR. FORTE) How long have you been using an
7 XY graph in your analysis of preferences?

8 A I believe my very first XY graph used in a
9 preference analysis may have been nine or 10 years ago.

10 Q What software is used for that?

11 A At that time, it was an Excel spreadsheet.

12 Q Is it still an Excel spreadsheet?

13 A No.

14 Q What is it now?

15 A Our software system is a Sequel server
16 database back-end with an Access front end or user
17 interface grafted together.

18 Additionally, there's some custom
19 programming, one of which is taking what started out
20 life as an Excel XY graph, tweaking it to fit into that
21 system. Thus it generated the charts you see.

22 Q Well, I'm not sure I understood all that. But
23 you -- you took the Excel XY graph and modified it?

24 A Uh-huh.

25 Q You have to say "yes" or "no" so he can get it

1 down.

2 A I'm sorry. Yes.

3 Q Thank you. And how precisely did you modify
4 the Excel spreadsheet?

5 A I didn't do the modification, so I wouldn't be
6 able to tell you. We hired a programmer to do that.

7 Q Well, did you give instructions to the
8 programmer as to what you wanted?

9 A Yes.

10 Q What instructions were those?

11 A Make it look like the graph in my expert
12 report as opposed to the graph that comes out of the
13 stock Excel schedule.

14 Q How does it differ?

15 A The Excel -- other than the basic concept of
16 the two axes and plotting data points, the Excel
17 schedule doesn't have any of the titles and it doesn't
18 look like that. So we made it look the way we wanted.

19 We chose to put certain report
20 restrictions and certain statistical data up there and
21 the titles so that it would be a little more
22 user-friendly and easier to read, we hoped more useful.

23 Q Can -- can you give me a precise example of
24 what was added to the Excel form?

25 A Other than saying everything on that tab,

1 A I can't quote it. It's the AICPA Code of
2 Professional Conduct.

3 Q Did you conduct your report and opinion in
4 this case in accordance with the AICPA Code of
5 Professional Conduct?

6 A Yes.

7 Q In this matter, were there any reason for you
8 to apply general accepted accounting principles?

9 A No.

10 Q How about general accepted accounting
11 standards?

12 A Generally accepted accounting standards?

13 Q Excuse me. Generally accepted auditing
14 standards.

15 A No.

16 Q How about any of the rules or guidelines set
17 forth by the Fair Accounting Standards Board?

18 MS. STREUSAND: Objection to the form of
19 the question.

20 Q (BY MR. FORTE) Maybe I'm using the wrong
21 title. FASB, F-A-S-B, doesn't that stand for Fair
22 Accounting Standards Board?

23 A I don't think so.

24 Q What -- what does it stand for?

25 A I don't know, but it's not fair. Well, that's

1 affect on the preferential payments?

2 A I base that on the timing of the e-mails, the
3 content of the e-mails and the timing of the preference
4 payments.

5 Q What do you mean by that?

6 A Okay. If I -- if I may just generally
7 explain, my one-time-through reading of the e-mails led
8 me to believe that, generally, the topic of those
9 e-mails was the creditworthiness of InaCom and the
10 ability of Dell to collect monies owed to it by InaCom
11 and the timing of those payments.

12 And I think at a -- a noteworthy factor
13 in those e-mails was what was categorized as a soft
14 credit hold on a few of the InaCom customer accounts.
15 I understand that the soft credit hold was lifted and
16 was not in effect during the preference period and that
17 the reason I say this doesn't affect the preference
18 period is that it's my understanding, based on my
19 understanding of case law, is that credit holds might
20 be construed in some cases as unusual collection
21 efforts.

22 And that impacts a preference payment if
23 a preference payment is made in response to unusual
24 collection efforts.

25 Q Based on Mr. Horton's e-mails, do you remember

1 the date on which the credit hold imposed by Dell was
2 resolved?

3 A Not based on the e-mails.

4 Q Based on something else?

5 A Yes.

6 Q Based on what?

7 A It was represented to me by counsel that, at
8 some point in time after those e-mails but before the
9 start of preference period, a financial transaction
10 involving Compaq -- and I really don't know what that
11 was -- occurred, which made funds available to catch
12 everything up.

13 Thus it was no longer an issue by the
14 time the preference period started.

15 Q Okay. So it was based on something that
16 occurred after the period of the e-mails but before the
17 preference period. Is that what you said?

18 MS. STREUSAND: Objection to the form.
19 That mischaracterizes his testimony.

20 A The e-mails talk about certain issues and
21 factors. And the last e-mail was somewhere in early or
22 mid-February. I don't recall the date. I was told by
23 Ms. Streusand that in mid-February this transaction
24 occurred, which allowed InaCom to clear up any of these
25 issues that might be leading to these soft credit

1 holds.

2 Thus it was no longer an issue or factor
3 at the start of the preference period. And
4 accordingly, none of the preference payments could have
5 been made in response to that soft credit hold.

6 Q (BY MR. FORTE) What was the transaction that
7 you were informed about?

8 A The Compaq transaction.

9 Q Do you know what that was?

10 A No.

11 Q Other than calling it the Compaq transaction,
12 do you know anything about it?

13 A Apparently, it generated some kind of funds to
14 be available to InaCom.

15 Q Have you seen any documents showing how funds
16 from the Compaq transaction were disbursed?

17 A No.

18 Q So you're basing this solely on what counsel
19 told you?

20 A Yes.

21 Q Did you make an attempt to verify what counsel
22 told you?

23 A No.

24 MS. STREUSAND: For clarification
25 purposes, did you also review the e-mails?

1 Vendor correctly, tell me if I'm wrong. That just
2 simply shows that, between February 1st, 1998 and March
3 17th, 2000, Dell sold \$183,822,705.41 of computer
4 equipment to InaCom; is that correct?

5 A That's the total of their invoices.

6 Q Right. And the total paid?

7 A Correct.

8 Q All right. Now Days to Payment to the right,
9 there is a number of items listed there: Mean, max,
10 min, median, standard deviation.

11 Could you explain for me first what the
12 mean is, 44.16?

13 A A layman would call that the average. I think
14 mean and average are synonymous.

15 Q What is it the mean of?

16 A The days to payment.

17 Q It's the average number of days between the
18 invoice date and the payment date?

19 A Correct.

20 Q And I assume that was just calculated
21 automatically by your computer.

22 A Yes.

23 Q So you're comfortable that it's accurate?

24 A Absolutely.

25 Q And what does max, M-A-X, mean?

1 A Maximum, the largest.

2 Q The largest days to pay?

3 A Yes, days to payment.

4 Q Okay. So that -- in other words, the invoice
5 that was the oldest during this two-year period?

6 A It is the greatest number of days between the
7 payment date and the invoice date, not necessarily the
8 oldest invoice.

9 Q Okay. I understand, 385 days. And minimum,
10 minus 129, what does that mean?

11 A That's the shortest, smallest number of days
12 to payment between the -- it's the shortest or minimum
13 number of days to payment during the historical period.

14 Q Why is it a negative number?

15 A According to the data we had to work with, a
16 payment was made before an invoice date.

17 Q By 129 days?

18 A Yes.

19 Q How were you able to discern that the payment
20 was for an invoice if it had not been identified yet?

21 A That's the way it came to me in the electronic
22 payment database.

23 Q So in other words, InaCom would make a payment
24 to Dell and Dell would issue an invoice for that
25 payment 129 days after receiving payment?

1 A That's what the electronic database says.

2 Q Did you do anything to verify if that's
3 accurate?

4 A No. That happened once for 14 hundred dollars
5 and change.

6 Q Only one time?

7 A Once.

8 Q Did anyone at Dell or elsewhere explain to you
9 how that happened?

10 A No.

11 Q Well, what's the minimum if you exclude the
12 negative 129? Do you know?

13 A I can tell you by looking at my reports.

14 Q Please do.

15 A Then the minimum is 110.

16 Q And that's not a negative number?

17 A It's a negative number.

18 Q So that's another situation where payment was
19 made 110 days before an invoice was issued?

20 A According to the electronic database.

21 Q Excluding all negative numbers, all negative,
22 quote, minimums based on your chart, do you know what
23 the shortest days to pay was?

24 A Yes.

25 Q What?

1 somehow one of the numbers happened to come out to 95
2 percent, which almost by definition is two standard
3 deviations. So I'm just quoting what he said in his
4 deposition.

5 Q All right. Well, let's go on to paragraph
6 four of the Newsom rebuttal report. With regard to Mr.
7 Thomas's report, there is no basis in statistics for
8 him to conclude that the ordinary course range
9 reflected in this data is from 27 to 71 days.

10 Do you agree with that statement?

11 A If I understand what basis and statistics
12 mean, if you mean adding, subtract, divide and multiply
13 calculating number of days between dates, then I
14 disagree because I do base my opinion on that simple
15 and not deep math.

16 If by statistics you mean standard
17 deviation, I agree.

18 Q Mr. Thomas states that this ordinary course
19 bracket included 95 percent of the dollars paid which,
20 according to his calculations, is just one standard
21 deviation. Do you agree with that?

22 A I vehemently disagree. I have no idea how he
23 came up with that.

24 Q Well, how do you disagree with it?

25 A Show me in my report where my calculations of

CERTIFICATE OF SERVICE

I, Alisa E. Moen, hereby certify that on this 6th day of September 2005 I caused a copy of the **Reply of Plaintiff in Support Of Its Motion In Limine To Exclude Expert Testimony Of Stephen H. Thomas** to be served upon the following counsel in the manner indicated:

VIA US MAIL AND FACSIMILE

Sabrina L. Streusand, Esquire
G. James Landon, Esquire
Hughes & Luce, L.L.C.
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Austin, TX 78701

VIA HAND DELIVERY

Patricia P. McGonigle, Esquire
Seitz, Van Ogtrop & Green, P.A.
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P.O. Box 68
Wilmington, DE 19899

Laura Davis Jones, Esquire
Pachulski Stang Ziehl Young Jones & Weintraub, P.C.
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Wilmington, DE 19899

A handwritten signature in black ink, appearing to be 'Alisa E. Moen', written over a horizontal line.

Alisa E. Moen (DE ID No. 4088)

**IN THE UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	
)	
INACOM CORP., <u>et al.</u> ,)	Chapter 11
)	
Debtors.)	Case No. 00-2426 (PJW)
_____)	
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INACOM CORP., on behalf of affiliated)	
Debtors,)	Civil Action no. 04-582-GMS
)	Adv. No. 02-3499
Plaintiff,)	
)	
v.)	
)	
DELL COMPUTER CORPORATION, <u>et al.</u> ,)	
)	
Defendants.)	
_____)	

**REPLY OF PLAINTIFF IN SUPPORT OF ITS MOTION IN LIMINE TO
EXCLUDE EXPERT TESTIMONY OF JOHN LARocca**

Plaintiff, Debtors, InaCom Corporation and affiliates, through Executive Sounding Board Associates, Inc., Plan Administrator (“Plaintiff”) replies to Dell’s opposition to its Motion *In Limine* to exclude testimony by John LaRocca of Quote to Cash Solutions (“LaRocca”), designated by Defendants Dell Computer Corporation, Dell Receivables, L.P. and Dell Marketing, L.P. (collectively, “Dell”) as an expert witness under Federal Rule of Evidence (“F.R.E.”) 702.

LaRocca’s Experience In Credit Ended In 1997

Dell exaggerates LaRocca’s expertise in the credit area. In 1997, LaRocca left the credit area at HP and moved “into [] sales and marketing”. LaRocca admits this was a career change. After leaving sales at HP in March 1998, LaRocca worked for Allied Signal as a consultant to “facilitate review of their overlapping business activities between Allied Signal and Honeywell and help them come to the best decisions possible to efficiently merge those two organizations”.

LaRocca then consulted with Gateway Computers on its business plan to acquire LeasingX and was then hired by LeasingX to work on developing “a commercial auction platform for computer equipment leases.” Thus, after switching positions at HP in 1997, LaRocca was no longer involved in the reseller credit market. (LaRocca Dep. Tr. 33:9-33:13, 80:20-80:25, 81:15-81:25, 82:16-83:17)¹.

LaRocca’s Opinion is Unreliable

LaRocca’s report also has numerous deficiencies which undermine its reliability. LaRocca admitted that he made no effort to conduct a market survey of the relevant industry. Nor did he personally select any of the companies to review that are referenced in the data submitted with his report. Rather, the companies were chosen for him by Dell and Lain Faulkner & Co., Inc. without any input by him. And, while there is data attached to LaRocca’s report, he admits that he did not rely on any of that data to reach his conclusions. LaRocca stated that his opinion was based solely on his experience in credit at HP, not on any of the data attached to his report. LaRocca also adopted Thomas’ ordinary course of business opinion wholesale, with no independent research, inquiry or certification. (LaRocca Dep. Tr. 126:9-129:11, 176:17-176:25, 177:23-178:11, 196:12-196:25).

Dell does not dispute that reliability requires an expert opinion “to be tied to the facts of a particular case.” Kumho Tire v. Carmichael, 526 U.S. 137, 150 (1999). LaRocca’s opinion is not tied to the facts of this case. Instead, it is, by LaRocca’s own admission, based solely on his dated experience in credit at HP, experience which he supports with no data, only hearsay information from old meetings and former colleagues. It is improper for Dell to designate

¹ Deposition transcript excerpts from LaRocca’s deposition are attached as Exhibit A.

LaRocca as an expert so he can rely on stale, anecdotal evidence that would be inadmissible hearsay if offered through a fact witness.

LaRocca's Testimony on Alleged "Held Checks" is Irrelevant.

Dell contends that LaRocca's hearsay testimony on Inacom's alleged check holding in 1997 to freeze funds temporarily in order to comply with lending covenants with IBM Credit Corp., is comparable to InaCom's holding of checks in 2000 due to severe cash flow problems; the latter resulting in Inacom's Treasurer, Richard Oshlo actually locking the checks in his office and only releasing them when funds were available. This comparison by Dell is absurd. The two situations are not only years apart, but had completely different factual predicates. LaRocca testified that the IBM situation was not due to cash flow problems, but to IBM's tough credit policies. LaRocca's testimony on this point is not only irrelevant, but inadmissible hearsay because it is based on his knowledge as a fact witness, not as an expert. (LaRocca Dep. Tr. 161:10-162:7, 162:18-162:24, 199:4-10, 201:16-24; Oshlo Dep. Tr. 217:9-217:12²).

For the foregoing reasons, and those stated in Plaintiff's motion, LaRocca's testimony regarding "ordinary business terms" should be excluded.

Respectfully submitted,

BLANK ROME LLP



Dated: September 6, 2005

Bonnie Grantz Fatell, Esquire (DE No. 3809)
Elio Battista, Jr., Esquire (DE No. 3814)
Alisa E. Moen, Esquire (DE No. 4088)
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² Deposition transcript excerpts from Oshlo's deposition are attached as Exhibit B.

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- and -

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Attorneys for Plaintiff Executive Sounding Board
Associates, Inc., as Plan Administrator for Debtors

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

COPY

In re:) Chapter 11
INACOM CORP., et al.,) Case No. 00-2426 (PJW)
Debtors.) Jointly Administered

INACOM CORP.,)
On behalf of all affiliated) Civil Action No.
Debtors,) 04-582 (GMS)
Plaintiffs,)
V.) Adv. Pro. No.
DELL COMPUTER CORPORATION,) 02-03499 (PJW)
Et al.,)
Defendants.)

ORAL DEPOSITION OF

JOHN LaROCCA

JULY 14, 2005

ORAL DEPOSITION of JOHN LaROCCA, produced as a witness at the instance of the Plaintiffs, and duly sworn, was taken in the above-styled and numbered cause on the 14th day of July, 2005, from 9:35 a.m. to 5:09 p.m., before David Bateman, RPR, CSR in and for the State of Texas, reported by machine shorthand, at the offices of Hughes & Luce, LLP, 111 Congress Avenue, Suite 900, Austin, Texas 78701, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

FREDERICKS-CARROLL REPORTING
(512) 477-9911

DISK
ENCLOSED

A P P E A R A N C E S

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(512) 482-6842

ALSO PRESENT:

MR. STUART GOLLIN (Via Telephone)
Weiser, LLP

1 calendar year?

2 A Yes. That was -- that program lasted less
3 than one month in duration.

4 Q Now you also did some training in team
5 development with Bentonville Associates.

6 A That's correct.

7 Q What was that?

8 A Bentonville Associates is on the location of
9 the Wal-Mart Company. In 1997, I switched career
10 positions in HP and moved from credit back into a sales
11 and marketing responsibility for the global
12 responsibility for the Pinacor account for
13 Hewlett-Packard.

14 Bentonville Associates facilitated
15 training on how to manage global accounts, building
16 effective relationships at executive levels. And that
17 was an on-site program in Fayetteville, Arkansas. It
18 was one week in duration.

19 Q And what year was that? You said '97?

20 A 19 -- that was 1997.

21 Q All right. Have you described to me all of
22 your formal training as a professional aside from job
23 experience?

24 A At Hewlett-Packard, in order to maintain
25 yourself from a current standpoint in business

1 you've just described, did you begin working again?

2 A I was recruited by Allied Signal. I think the
3 words of their treasurer were "you're too young to be
4 retired." I wasn't retired. I needed a job.

5 Allied Signal was merging with Honeywell
6 and they had overlapping treasury operations, credit
7 and collections operations. I was recruited with one
8 other person, another consultant, to help them
9 efficientize their treasury services and credit
10 collections on a global basis.

11 Q How long were you paid by De Lage Landen after
12 you left?

13 A Well, I was paid immediately at my choice for
14 the next three years.

15 Q So until about 2002?

16 A Yes.

17 Q Were you hired as an employee of Allied
18 Signal?

19 A No, consultant.

20 Q Consultant? And what was the purpose of your
21 consulting?

22 A It was to facilitate review of their
23 overlapping business activities between Allied Signal
24 and Honeywell and help them come to the best decisions
25 possible to efficiently merge those two organizations.

1 The objective was to save 10 million
2 dollars over a 24-month period. I was only engaged for
3 90 to 120 days. They exceeded that 10 million dollars
4 anticipated savings.

5 Q Okay. So you were in that consulting position
6 with Allied Signal for 90 to 120 days?

7 A Yes, sir.

8 Q That was in?

9 A October through January -- October of '99
10 through January -- no, excuse me. I said '99. Yeah.
11 Just getting my dates right.

12 MS. STREUSAND: I think you can
13 approximate.

14 A Yeah. October '99 through January 2000.

15 Q (BY MR. FORTE) And what did you do after you
16 finished the consulting work with Allied Signal and
17 Honeywell?

18 A As I was wrapping that up, I received a call
19 from Gateway Computers. And they had been a company
20 that sold specifically to consumers and now were
21 getting into the commercial reseller channel
22 distribution business and didn't know how to do it.

23 Instead of extending two and \$10,000
24 credit facilities, they were now being asked to extend
25 five million and \$10 million credit facilities. And

1 there was disconnects between their selling
2 organization and their credit organization had no
3 experience.

4 I was contracted to go do an on-site
5 review of their -- at their headquarters in South
6 Dakota of their current business practices and make
7 recommendations and which resulted in creating a
8 commercial credit policy for Gateway Computers.

9 And that was done from December of '99, I
10 was engaged, until it was completed at the end of March
11 of 2000.

12 Q All right. Did you go from the Gateway
13 consulting job to LeasingX?

14 A I did.

15 Q What did you do at LeasingX?

16 A I was again consulted in April of 2000 by
17 Gateway Computer. They were involved in evaluating a
18 start-up company by the name of LeasingX and looking to
19 put a financial investment in LeasingX.

20 LeasingX was purported -- it was started
21 in fall of 1990 -- fall of 1999. And their ambition
22 was to create a commercial auction platform for
23 computer equipment leases.

24 Before Gateway would invest in it, they
25 asked me to go to New York and evaluate the business

1 plan of the principals and talk to the principals and
2 give them my opinion. I did that and I met with them
3 in April.

4 In fact, I met with them at 30th Street
5 Station, Philadelphia in my initial meeting. And
6 through April and early May, I gave Gateway a written
7 report on my opinion.

8 At the end of May, Gateway came back,
9 along with the people at LeasingX, and said, "We'd like
10 to offer you the position of vice-president of
11 operations for LeasingX," which I accepted.

12 And on or about the 1st of July, they
13 offered me the president position for LeasingX, which I
14 accepted. And I stayed in that capacity through
15 January 1st of 2001.

16 Q Why did you leave LeasingX?

17 A They ran out of money. They ran out of it
18 before I left, but the impact of the devastation that
19 took place on 9/11 stopped -- as I talked to a VP of
20 sales for Hewlett-Packard in November, he said, "John,
21 if we didn't have orders to replenish data centers that
22 were destroyed in New York City, we would have
23 absolutely no orders for computer systems as I'm
24 talking to you today. Nobody's buying anything."

25 And the order flow went away. And it was

1 in the way that it tells you the number of invoices
2 that were paid and the days to payment column proceeds
3 it to the left.

4 Q And how does --

5 A The total invoices relates to the number of --
6 the total dollar value of those number of invoices
7 consistent with those number of payments, the days to
8 payment.

9 Q All right. Now near the bottom of the page on
10 tab six, there are some black lines. Do you see them?

11 A I do.

12 Q Heavy black lines, do you know what those
13 represent?

14 A I believe I do. I believe that begins to show
15 the summary that is on page two, the summary in the
16 form of a number of invoices it represents that -- of
17 the invoices reviewed in this analysis, 93.4 percent of
18 them, or 18,284 of them, were between 27 days and 71
19 days.

20 Q All right. Did you assist Mr. Thomas at all
21 in reaching his 21 -- excuse me -- 27-to-71-day payment
22 range?

23 A I did not.

24 Q How did you use Mr. Thomas's conclusions in
25 six and seven with respect to your opinion?

1 A I think that this is evidence of my opinion.

2 Q All right.

3 A It supports my opinion.

4 Q And how does it support your opinion?

5 A That what he's projecting is the overwhelming
6 majority, almost 19 out of every 20 transactions, and
7 more than 19 out of every 20 dollars were paid within
8 the 27 days or 71 days from the date of invoice.

9 Q Do you know how Mr. Thomas went about
10 selecting his 27-to-71-day payment range?

11 A No.

12 Q Did you question him about it?

13 A No. It became self-apparent. I mean, we
14 never had a discussion about it. But it seemed like a
15 logical representation of information.

16 Q What seemed logical?

17 A That he projected, based on his review, that
18 19 out of 20 dollars and almost 19 out of every 20
19 transactions were paid in 27 to 71 days.

20 Q Did you do anything to verify whether Mr.
21 Thomas's conclusion was accurate?

22 A I perused some of the preceding information,
23 but I did not do an analytical analysis to validate
24 that because I wasn't asked to do that.

25 Q Okay. When you say perused, do you mean you

1 viewed?

2 A I reviewed tab four.

3 Q All right.

4 A And I reviewed tab five.

5 Q Did you read everything in tab four or did you
6 just review it?

7 A I went through -- I went through every page of
8 tab four, but I -- I didn't do statistical composition.

9 Q You didn't test the data?

10 A No.

11 Q You assumed it was accurate?

12 A Yes.

13 Q All right. Please turn to tab eight in Mr.
14 Thomas's report. Okay. Are these the XY charts
15 referred to in paragraph six of your report?

16 A Yes.

17 Q All right. And there's two of them, correct?

18 A Yes, there are.

19 Q Do you know the general difference between the
20 two?

21 A I believe one is two years of historical
22 information in advance and the other is the historical
23 information from the preference period.

24 Q Do you know what each diamond represents? I'm
25 sorry, John. Did you hear my question?

1 A I did. I'm just looking at the diamonds.

2 MS. STREUSAND: He wants to get a better
3 look at the charts. We're just trying to get them out
4 of the notebook so he can see them better.

5 A It represents validation of what we just
6 looked at in the preceding tabs. It's a pictorial
7 representation of when payments were made and, when
8 they were made, the days between the invoice date and
9 the date of payment.

10 Q (BY MR. FORTE) Okay. Well, can you give me a
11 specific example of how you can look at this XY chart
12 and determine the days to payment with respect to a
13 specific transfer?

14 A I reviewed this. I drew my conclusions from
15 the preceding documents we talked about, which were
16 21 -- 27 days to 71.

17 Q Right.

18 A This is a -- this is a picture of information.

19 Q Well, do you --

20 A This was -- go ahead.

21 Q Go ahead.

22 A This in itself supports the preceding reports
23 we reviewed.

24 Q Okay. How does it do that?

25 A It graphically depicts data points taken from

1 the preceding reports we were looking at that show when
2 payments were made and how old they were when they were
3 made --

4 Q Well --

5 A -- from the date of invoice.

6 Q When you say data point, do you mean the black
7 diamonds?

8 A Yes.

9 Q Okay. So you're saying an individual black
10 diamond represents when payments were made in relation
11 to an invoice?

12 A I anticipate that they represent elements that
13 are identical to what's on the information reports that
14 we precedently reviewed.

15 Q Okay. You're assuming --

16 A I didn't validate that.

17 Q You're assuming that?

18 A Yes.

19 Q All right.

20 A It's an illustration. Well, it's not an
21 illustration. It's a representation. And it -- if the
22 data points were entered correctly off of those
23 reports, then they would be reflected appropriately
24 here.

25 If there was some typographical data

1 A Accounts payable would process the invoice for
2 payment. The controllership would issue the -- issue
3 the payment. And I don't know if it needed multiple
4 signatures depending on the size.

5 But when they were being held, it was
6 represented by Leon to Lorn that he never held them,
7 they were always held in the treasurer's office. And
8 upon confrontation, that was always found they -- that
9 that's where they were being held.

10 Q Now when you say "confrontation," what do you
11 mean?

12 A Well, when -- when Lorn Morris would call Leon
13 and say where's my payment, he said John -- Lorn, I cut
14 the payment. If it's -- if you don't have it, it's
15 because it's being held at the treasurer's level.

16 Lorn would contact the treasurer. The
17 treasurer would validate -- he never said I -- I sent
18 it. He'd just -- when he hadn't, he'd say I have it
19 and I can't release it yet or I don't want to release
20 it yet.

21 Q Okay. So these -- these contacts you
22 described between HP and --

23 A InaCom.

24 Q -- InaCom regarding this holding of checks by
25 Gary Goldberg were principally between Lorn Morris and

1 InaCom?

2 A Yes. And then he would escalate it to me.
3 When Gary Goldberg would say, "Lorn, I can't mail the
4 check," then Lorn would come to me. And I would call
5 Dave Guenthner or we arranged to meet more frequently
6 that year than otherwise planned.

7 Normally, in inclement weather in the
8 winter, he would come to Cupertino. And in the milder
9 weather, I would go to Omaha.

10 Q Would the checks usually be released when you
11 asked for them to be released?

12 A Yes. Sometimes that was not the case, but
13 usually it was. They had reasons why they couldn't
14 release them.

15 Q Well, I was going to get to that. It states
16 in your report Dave Guenthner would always explain
17 these checks had been held as they, InaCom, were up
18 against their lending covenants of their IBM Credit
19 Corp. line of credit, unquote.

20 Was that the reason you were told that
21 checks were being held by Gary Goldberg?

22 A Consistently and always, that was the reason.

23 Q Were you ever told that checks were being held
24 by Gary Goldberg because InaCom was having cash flow or
25 liquidity problems?

1 A No. And I would have known that because of my
2 review of their financial statements, their cash flow
3 statements. And when we would have these situations,
4 we would then ask them to submit weekly, for a period
5 of time until the behavior went away, cash flow sources
6 and uses, how much income is coming in and how do you
7 deploy it, who are you paying.

8 And they would always comply.

9 Q Now you state here, quote, from my experience,
10 InaCom was not the only distribution customer that
11 would at times cut checks but then hold them for a
12 period of time before releasing them, unquote.

13 Can you give me some examples?

14 A Merisel in Los Angeles; Comp USA in Texas;
15 Intelligent Electronics in Chantilly, Virginia and
16 Exton, Pennsylvania; CoMark in Chicago; Ingram on less
17 occasions, but occasionally, Ingram Micro.

18 Q Uh-huh.

19 A Tech Data in St. Petersburg. It was not an
20 uncommon behavior. And -- and usually the reason had
21 more to do with meeting lending covenants of their
22 lender, who was usually the IBM Credit Corporation.
23 They were the most aggressive lender in those years to
24 this channel.

25 Q What do you mean by that?

1 Q Jacom, J-A-C-O-M, LASON, L-A-S-O-N and that's
2 all, correct?

3 A Yes.

4 Q Okay. Now could you turn to the first page of
5 the Jacom data in the back of your report? It says
6 unpaid invoices as of filing date at the top.

7 A I have it.

8 Q What does this information show?

9 A Invoices due to Dell from Jacom at the date of
10 the filing for reorganization that were unpaid, I
11 anticipate. I didn't go back and prove this. I'm just
12 reading what you're reading.

13 Q Okay. Now the data on this document doesn't
14 give you any indication of what ordinary business terms
15 were, does it?

16 A No.

17 Q All right. And it doesn't give you any
18 indication of what ordinary course payments were, does
19 it? It's just a list of invoices, dates and amount.
20 Correct?

21 A Yeah. It's -- it's data. It's not
22 information.

23 Q Okay. So you wouldn't have been able to use
24 this to reach your conclusion?

25 A I didn't.

1 Q Okay. Well, why is it in here?

2 A Because it was supplied to me and that's the
3 only reason it's in there.

4 Q Okay. Now following this, I have a letter
5 from Rick Cass at Lain Faulkner to you enclosing
6 some -- I think three CDs, it states.

7 A Uh-huh.

8 Q What was in those three CDs?

9 A That was the MicroAge/Pinacor invoices and
10 payment information. I think that's tab number four,
11 if I'm not mistaken, from Exhibit 2.

12 Q Mr. Thomas's report?

13 A Yes.

14 Q Okay. I believe it's tabs four and five,
15 which would be the --

16 A You're right. It is four and five.

17 Q Okay. So those two things, the
18 MicroAge/Pinacor data --

19 A Uh-huh.

20 Q -- and the information that's in tab four and
21 five of Mr. Thomas's report related to InaCom?

22 A Uh-huh.

23 Q Could you turn to the next page. I have a
24 document, LASON versus Dell unpaid invoices as of
25 filing date. Again, this doesn't give any indication

1 of ordinary business terms or ordinary course of
2 business, does it?

3 A No.

4 Q It's just a list of invoice numbers, dates and
5 amounts?

6 A It is.

7 Q And you wouldn't have used this in your
8 opinion?

9 A I perused this, as I perused the preceding
10 document. But my opinion is highly based on my
11 experience, not on this document.

12 Q All right. Now the next page of data states
13 Jacom Computer Services, Inc. versus Dell invoice paid
14 analysis.

15 Could you explain to me what this
16 document is?

17 A It shows the one-year period prior to the
18 preference period in that bankruptcy. It shows the
19 preference period in that bankruptcy.

20 It shows the historical number of
21 invoices in each of the aging buckets, what percentage
22 of the total invoices they represent, what the
23 corresponding total of invoice dollars by aging bucket
24 that are represented, and what the total number of
25 invoice dollars, as a percentage of the whole, each

1 THE WITNESS: -- pit stop?

2 MR. FORTE: Please. Absolutely.

3 (Recess from 3:03 p.m. to 3:24 p.m.)

4 Q (BY MR. FORTE) Now other than InaCom, Mr.
5 LaRocca, you reviewed data with respect to Dell's
6 payment histories with MicroAge, Jacom, LASON. And I
7 think that's it, correct?

8 A Yes.

9 Q All right. Did you make any effort to review
10 data with respect to additional companies?

11 A No.

12 Q Okay. Did you make any effort to conduct a
13 market survey?

14 A No.

15 Q All right.

16 A Notwithstanding my phone calls to the two
17 people we discussed previously.

18 Q Understood. Why did you select MicroAge,
19 Jacom, and LASON?

20 A I didn't.

21 Q They were just given to you?

22 A Yes.

23 Q Okay. Did you ask for more examples?

24 A No.

25 Q All right.

1 experience with InaCom. When that evidenced by my
2 report, that's when it was suggested that I could also
3 be a fact witness. It was bad marketing on my part.

4 Q Well, could you look at paragraph six and
5 seven of your report, please?

6 A Sure.

7 Q Is any of the information in paragraph six
8 based on your knowledge as a fact witness as opposed to
9 an expert?

10 A Yes.

11 Q Okay. What would that be?

12 A The reports by Mr. Thomas -- not the report,
13 the information, the data that he provided that
14 demonstrated the 95 percent plus or minus invoices and
15 dollars paid in the 27-to-71-day window after the date
16 of invoice.

17 Q That's information you know as a fact witness?

18 A I do -- I do -- I -- I know information as a
19 fact witness. And then I took that information in
20 processing it and said this supports what I know the
21 industry to be.

22 Q Okay. So --

23 A I -- I would have an opinion independent of
24 any of this as a fact witness. But this -- that --
25 that specific information, I think, is valuable

1 dealings with them when you used to work with them
2 would be --

3 A And ongoing.

4 Q And ongoing would be based as -- on your
5 knowledge as a fact witness; is that right?

6 MS. STREUSAND: I object to the form of
7 the question.

8 A I think my conversations with both of those
9 gentlemen is supportive of my expert report.

10 MR. FORTE: I understand.

11 A And I think that it also supports my knowledge
12 base that I've developed over a period of time as a
13 fact witness because my familiarity with Compaq from
14 years ago, in part, is due to my relationship with Dave
15 Kaminski.

16 Q (BY MR. FORTE) Well, in paragraph seven, which
17 is the longest paragraph in your report, you talk a lot
18 about your meetings with David Guenthner and others at
19 InaCom. And we went over that today.

20 You talked about Gary Goldberg and the
21 check holding issue, the IBM situation. That's factual
22 information that you gathered at the time you worked
23 for Hewlett-Packard, correct?

24 A Yes.

25 Q All right. And is it fair to say that the

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In re
INACOM CORP., et al. Bankruptcy Case No. 00-2426 PJW

INACOM CORP., on behalf :
of all affiliated Debtors, : Civil Action No. 04-148 GMS
Plaintiff, : (Original filed in this Action)
v. : Adversary Case No. 02-03496 PJW

TECH DATA CORP.,
Defendant.

COPY

INACOM CORP., on behalf of :
all affiliated Debtors, :
Plaintiff, : Civil Action No. 04-582 GMS
v. : Adversary Case No. 02-03499 PJW

DELL COMPUTER CORPORATION,
Defendant.

INACOM CORP., on behalf of :
all affiliated Debtors, :
Plaintiff, : Civil Action No. 04-583 GMS
v. : Adversary Case No. 02-03500 PJW

LEXMARK INTERNATIONAL, INC.,
Defendant.

DEPOSITION OF RICHARD CHARLES OSHLO, JR.,
March 20, 2005

KATHRYN POWERS- CERTIFIED SHORTHAND REPORTER

INACOM CORP., on behalf of
all affiliated Debtors,

Plaintiff,

v.

RESILIEN, INC., et al.,

Defendant.

Civil Action No. 04-584 GMS

Adversary Case No. 02-03501 PJW

INACOM CORP., on behalf of
all affiliated Debtors,

Plaintiff,

v.

INGRAM ENTERTAINMENT, INC.,
Successor in interest to
NASHVILLE COMPUTER
LIQUIDATORS,

Defendant.

Civil Action No. 04-593-GMS

Adversary Case No. 02-03960 PJW

INACOM CORP., on behalf of
all affiliated Debtors,

Plaintiff,

v.

SIGMA DATA, INC,

Defendant.

Civil Action No. 04-601 GMS

Adversary Case No. 02-04441 PJW

DEPOSITION OF RICHARD CHARLES OSHLO, JR.,

taken by the Defendants before Kathryn Powers, Certified
Shorthand Reporter of the State of Iowa, at the Renaissance
Savery Hotel, Room 210, Des Moines, Iowa, commencing at
9:45 a.m., Sunday, March 20, 2005.

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Jason Fensterstock
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25

1 initial facility we had with them. They had floor
2 planning and a bank credit document combined.

3 BY MR. NOLAN:

4 Q. Okay. There's a reference here, it says,
5 "Checks Held, 31,271,000. Do you see that?

6 A. Yes.

7 Q. Is that your handwriting?

8 A. No.

9 Q. In 1999 were you ever holding \$31,227,000
10 of held checks in the treasury department at
11 InaCom that were due to or payable to IBM?

12 A. No.

13 MR. HALLIDAY: I'm sorry, Jeff. Your
14 question was limited to just the treasury
15 department?

16 MR. NOLAN: Yes.

17 Q. Did you ever become aware in 1999 that
18 the accounts payable department was holding \$31
19 million in checks that were owed payable to IBM?

20 A. Not that I recall.

21 MS. STREUSAND: Jeff, can we take a quick
22 break?

23 MR. NOLAN: Sure.

24 (Recess.)

25 MR. NOLAN: Back on the record.

CERTIFICATE OF SERVICE

I, Alisa E. Moen, hereby certify that on this 6th day of September 2005 I caused a copy of the **Reply of Plaintiff in Support Of Its Motion In Limine To Exclude Expert Testimony Of John LaRocca** to be served upon the following counsel in the manner indicated:


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